Supreme Court, U.S.
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No. 01-1796

IN THE

Supreme Court of the United States

BASE METAL TRADING, LIMITED,
Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

MARK D. GATELY*
STEVEN F. BARLEY
IRA M. FEINBERG
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
111 South Calvert Street
Suite 1600
Baltimore, Maryland 21202
(410) 659-2700

* Counsel of Record

Counsel for Respondent OJSC "Novokuznetsky Aluminum Factory"

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's holding that a foreign plaintiff seeking to confirm a foreign arbitration award against a foreign defendant must show that the defendant has sufficient minimum contacts with the United States to support *in personam* jurisdiction, and cannot base jurisdiction on the attachment of property allegedly belonging to the defendant that was in transit to a customer in the United States, where:

- the Fourth Circuit's decision is consistent with this Court's holding in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), that the exercise of jurisdiction must, in all cases, satisfy the "minimum contacts" test;
- there is no conflict with a decision of any other circuit;
- the plaintiff never raised its novel theory of jurisdiction in the District Court;
- the property had been released by the District Court, thus eliminating any conceivable basis for jurisdiction, before the plaintiff sought to invoke any theory of *quasi in rem* jurisdiction; and
- the Court would be deciding the issue on hypothetical facts, "assumed" by the courts below, where the actual facts make clear that title to the property had passed to a third party before this action was filed.

RULE 29.6 STATEMENT

Respondent OJSC Novokuznetsky Aluminum Factory ("NKAZ") is a Russian corporation. Sixty-six percent of the stock of NKAZ is now owned by OJSC Russian Aluminum, the stock of which is not publicly held. No publicly held company owns ten percent or more of NKAZ's stock.

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BRIEF IN OPPOSITION

Respondent OJSC Novokuznetsky Aluminum Factory ("NKAZ") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The petition in this case does not meet any of the established criteria for granting certiorari and presents no compelling reason why this Court should grant review. *See* S. Ct. Rule 10. Petitioner Base Metal Trading Ltd. (BMT), a Guernsey-registered metals trading company, sought in this case to obtain personal jurisdiction in Maryland over NKAZ,

an aluminum manufacturer located in Siberia, to confirm an arbitration award that BMT had obtained against NKAZ in Russia, in a dispute that had nothing to do with any alleged conduct or property in the United States. *See* J.A. 18-23.[1] The courts below held that NKAZ did not do business in Maryland and that there were no minimum contacts between NKAZ and Maryland, or between NKAZ and the United States as a whole, sufficient to justify the exercise of personal jurisdiction over NKAZ. BMT in its petition does not challenge these rulings.

Instead, BMT argues the novel theory that it is entitled to bring an action against NKAZ in the United States to confirm a foreign arbitration award, even though NKAZ has no minimum contacts with the forum state or the United States as a whole, if it is able to locate and attach aluminum manufactured by NKAZ in Russia which is en route to a customer in the United States. In effect, BMT claims the ability to force a foreign defendant, which does no business in the United States, to defend an action in a United States court seeking an *in personam* judgment confirming a foreign arbitration award, simply by attaching a shipment of metal and alleging—"contrary to the apparent facts," as the District Court noted, Pet. App. 27a—that this metal was the property of NKAZ.

There is no reason for this Court to review the Fourth Circuit's ruling rejecting this claim. BMT's novel theory was never presented to the District Court. On the contrary, BMT's complaint and all of its papers in the District Court asserted that NKAZ had minimum contacts with Maryland and the United States sufficient to establish *in personam* jurisdiction over NKAZ.

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[1] "J.A." refers to the Joint Appendix filed by the parties in the Fourth Circuit; "Pet." refers to the Petition for Certiorari; "Pet. App." refers to the Appendix to the Petition.

Moreover, the Fourth Circuit's ruling is fully consistent with the decisions of this Court, and particularly with this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). As the Fourth Circuit correctly recognized, Pet. App. 7a, *Shaffer* held that the "minimum contacts" standard of *International Shoe Company* v. *Washington*, 326 U.S. 310, 316 (1945), applies to all exercises of jurisdiction, including *in rem* and *quasi in rem* actions. 433 U.S. at 207-12. What petitioner describes as the "holding" of *Shaffer*, Pet. i, 7-8, was in fact *dicta* in a footnote, 433 U.S. at 210 n. 36, suggesting that an exception to the general rule might be appropriate where a plaintiff who had obtained a judgment in one state sought to collect that judgment against property owned by the defendant in another state. But even if that *dicta* states the correct legal rule with respect to judgments entitled to full faith and credit, there is nothing in *Shaffer* which relates in any way to the enforceability of a foreign arbitration award, a very different issue that this Court has never addressed.

Similarly, petitioner's claim that the decision below conflicts with a recent decision of the Ninth Circuit is baseless. In fact, the decision cited by petitioners, *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), held that there was no jurisdiction over the foreign defendant, and merely suggested in *dicta* the possibility that a stronger showing in another case might support jurisdiction to confirm a foreign arbitration award based on property owned by the defendant in the state.

The decision below is thus the only appellate decision to address whether jurisdiction to enforce a foreign arbitration award can be based on the existence of property in a state in the absence of minimum contacts, and the Fourth Circuit faithfully applied this Court's precedents in holding that it cannot. In these circumstances, review by this Court is unwarranted. This is particularly true in light of other aspects of this case—including plaintiff's failure to raise the issue in the District Court, the fact that title to the property

had plainly passed to the purchaser long before the aluminum arrived in the United States, and the fact that the attachment of the metal has been released and no longer provides any basis for jurisdiction—that make this case a singularly inappropriate vehicle to consider the issue plaintiff seeks to raise.

COUNTERSTATEMENT

1. BMT is a Guernsey corporation engaged in metals trading, and alleges that its principal place of business is in London, England. J.A. 11. NKAZ is a Russian corporation that manufactures aluminum at its plant in Novokuznetsk, in the Kemerovo Region of Siberia. J.A. 11.[2]

From 1995 through 1999, BMT and NKAZ had extensive business dealings. J.A. 11, 20. On November 1, 1999, BMT filed an arbitration claim against NKAZ before the Moscow Chamber of Commerce and Industry. J.A. 18. BMT claimed that it had been compelled by the English courts to satisfy a prior arbitration award against NKAZ, which had been issued by a Zurich arbitration panel in favor of two NKAZ creditors, Soinco S.A.C.I., an Argentine corporation, and Eural KFT, a Hungarian corporation, based on NKAZ's alleged 1995 breach of its contracts to supply them with aluminum. J.A. 18-20.[3] After BMT paid the award, BMT sought reimburse-

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[2] "NKAZ" is short for Novokuznetsk Aluminum Zavod, the name of the company in Russian. ("Zavod" is the Russian word for "plant" or "factory.") "OJSC" stands for Open Joint Stock Company, a form of Russian corporation.

[3] The English courts had held it appropriate to require BMT to pay this debt owed by NKAZ because, at the time, the same individuals (Mikhail Zhivilo and his brother, Yuri Zhivilo) controlled both BMT and NKAZ, and because Mikhail Zhivilo had been responsible for directing NKAZ's aluminum production away from Soinco and Eural and towards his controlled entity, BMT, when he took control of NKAZ in 1995. *See Soinco SACI et al.* v. *Novokuznetsk Aluminum Plant et al.*, [1998] 2 Lloyd's Rep. 346, 348-49, 355-56, 1997 WL 1104502, at 4-7, 13-14 (C.A. Dec. 16, 1997).

ment from NKAZ for the amount it had paid on NKAZ's behalf. J.A. 20. On December 10, 1999, the Moscow arbitrators issued an award in favor of BMT in the amount of approximately $12 million. J.A. 18-23.

2. On June 29, 2000, BMT filed its complaint in this action, seeking a judgment confirming the Moscow arbitration award. BMT sought confirmation in accordance with the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (reprinted in U.S.C.A. following 9 U.S.C. § 201), adopted in New York in 1958 ("the Convention"), and U.S. implementing legislation, codified at 9 U.S.C. §§ 201 *et seq*. The complaint named NKAZ as the sole defendant, and alleged that the court "has jurisdiction over NKAZ because, on information and belief, it transacts business in the State of Maryland through the Port of Baltimore." J.A. 12. The complaint cited no other basis for jurisdiction over NKAZ and made no reference to any alleged property of NKAZ in the State. The complaint sought an *in personam* judgment against NKAZ in the full amount of the arbitration award, approximately $12 million. J.A. 13.

On the same day, BMT filed a motion, under Rule 64 of the Federal Rules of Civil Procedure, to attach a cargo of aluminum that had allegedly arrived in the Port of Baltimore the night before. J.A. 31-36. BMT's motion alleged that the cargo of "aluminum T-bars" was "manufactured and presently owned" by NKAZ, J.A. 32, and that the value of the aluminum was approximately $3.8 million. J.A. 33. The District Court granted the requested attachment the same day. J.A. 37-40.

3. Approximately one week later, on July 7, 2000, independent third parties, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd. (collectively "MG"), moved to vacate the attachment. MG submitted extensive

documentation to show that it held title to the aluminum, and had title before the aluminum had arrived in Baltimore. These documents demonstrated that MG had purchased the aluminum from Aluminum of Siberia (UK) Ltd. pursuant to a contract dated April 19, 2000, on terms "F.O.B. St. Petersburg"; that MG had thus acquired title to the aluminum when it was loaded on the vessel at the time of its departure from St. Petersburg, Russia, on or about April 28, 2000; and that MG had fully paid for the aluminum. *See* Emergency Motion to Vacate Attachment, filed July 7, 2000, and Decl. of Martin T.O. Stanley, dated July 7, 2000, ¶¶ 4-5 and Ex. A-K. The District Court granted this motion the same day, and entered an order vacating the attachment. The Court's order directed, however, that the proceeds of the sale of the metal be held in escrow until further order. J.A. 45.

On July 19, 2000, MG filed a motion to vacate the order requiring the funds to be held in escrow. MG's motion cited BMT's failure to provide any evidence that NKAZ rather than MG held title to the aluminum. MG also noted its own financial solvency. *See* Motion to Vacate Order Establishing Escrow Account, filed July 19, 2000, and Mem. of Law in support thereof, at 3-5, 7. In response, BMT did not seriously dispute that MG held title, but argued instead that MG was not a bona fide purchaser. *See* Plaintiff's Mem. of Law in Opp. to Mot. to Vacate Order Establishing Escrow Account, filed Aug. 27, 2000, at 2-3.

After full briefing, the District Court issued an opinion dated October 18, 2000, indicating that it intended to grant this motion.[4] The Court reasoned that "[t]he purpose of the July 7 Order was to permit MG to deal with the metal while preserving the status quo by having the escrowed funds stand in the place of the metal while the merits of the attachment were sorted out," App. E at 2a, and that there was no further

[4] A copy of the Court's Memorandum and Order of October 18, 2000 is included at the back of this Brief in Opposition as Appendix E.

need for the July 7 order in light of MG's showing that it had the ability to pay any judgment and its agreement to subject itself to the jurisdiction of the court. App. E at 2a-3a. The Court stated, however, that it would "briefly, defer issuing an Order * * * to afford Plaintiff the opportunity to file a claim against MG in this Court while the subject metal (and the escrow account held as a substitute for the metal) are within the jurisdiction of the Court." App. E at 3a.

BMT failed, however, to take advantage of this opportunity to bring MG into the lawsuit as a party so that it could contest MG's title to the aluminum. *See* Pet. App. 3a, 27a n.3. Accordingly, on October 26, 2000, the District Court issued an order granting MG's motion to vacate the July 7 order, and ordering that "[a]ll monies deposited in the escrow account * * * be immediately released to [MG]." J.A. 49-50. Thus, since October 26, 2000, at the latest, there have been no property or funds subject to the jurisdiction of the District Court that even arguably belonged to, or could be traced to, NKAZ.

4. BMT made no effort to serve NKAZ until August 15, 2000. According to an affidavit later filed by BMT, on that date it sent a copy of the summons and complaint to NKAZ in Novokuznetsk by use of a commercial courier service. J.A. 85. NKAZ did not respond to the complaint, and later challenged the adequacy of this purported service of process. On January 18, 2001, BMT filed a motion for entry of a default judgment. On January 25, 2001, the District Court granted the motion for a default, and on January 26, the clerk entered a default judgment against NKAZ. J.A. 53, 55.

Upon learning of the default judgment, NKAZ moved promptly on February 14, 2001 to vacate it. In support of its motion, NKAZ argued that BMT's alleged service of process on NKAZ was invalid, and that NKAZ was not subject to the jurisdiction of the court. In response, BMT asserted that it had demonstrated that NKAZ had minimum contacts with

Maryland sufficient for the Court to exercise personal jurisdiction, or alternatively, that BMT should be granted an opportunity for discovery in an effort to demonstrate minimum contacts. *See* Plaintiff's Mem. of Law in Opp. to Mot. to Vacate Default Judgment, filed Feb. 28, 2001, at 10-13; Plaintiff's Sur-Reply Mem., filed Mar. 16, 2001, at 6-7. BMT never asserted that the Court could have jurisdiction over NKAZ without minimum contacts, based on the alleged presence of its property in the State, and never cited *Shaffer* v. *Heitner*, the case BMT now claims supports that position.

5. On April 3, 2001, the District Court granted NKAZ's motion to vacate the default judgment and dismissed the complaint for lack of personal jurisdiction. Pet. App. 20a-28a.[5] On the jurisdictional issue, the District Court applied the minimum contacts test of *International Shoe Co.* v. *Washington*, 326 U.S. 310, and held that it did not have personal jurisdiction over NKAZ because "NKAZ is a Russian corporation with its principal place of business there and having no connection with Maryland." Pet. App. 27a. With respect to the metal that NKAZ had shipped to Baltimore, the District Court held that even "[a]ssuming, contrary

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[5] BMT asserts that the District Court "dismissed the case *sua sponte*," Pet. 5, but this assertion is not correct. NKAZ argued at length in its motion to vacate the default that the court lacked personal jurisdiction over NKAZ, *see* Mem. in Support of Mot. to Vacate Default Judgment, filed Feb. 14, 2001, at 12-16; attached a declaration from S.A. Tchernyshov attesting to NKAZ's lack of contacts with Maryland and the United States, J.A. 93-94; and specifically asked, in its proposed order, for the District Court to dismiss the case. *See* Proposed Order, filed Feb. 14, 2001. In response, BMT devoted a full section of its memorandum to an effort to demonstrate that "NKAZ has sufficient minimum contacts in order to exercise personal jurisdiction." Plaintiff's Mem. in Opp. to Mot. to Vacate Default Judgment, filed Feb. 28, 2001, at 10-13. Indeed, in a rare moment of candor, BMT conceded in its motion for reconsideration that "NKAZ also argued in its motion [to vacate the default] that this Court lacked personal jurisdiction over NKAZ." Plaintiff's Mot. for Reconsid., filed Apr. 17, 2001, at 1, ¶ 1.

to the apparent facts," that this metal belonged to NKAZ at the time it arrived in the United States, "there would still be no adequate jurisdictional nexus." *Id.* As the court explained, "the hypothetical NKAZ shipment of its metal and sale in Maryland would permit specific jurisdiction over NKAZ over a lawsuit relating to the shipment," but "[b]y no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ." *Id.* The District Court also rejected BMT's request to conduct discovery on the jurisdictional issue. *Id.* at 27a-28a.

6. On April 17, 2001, BMT filed a motion for reconsideration in the District Court. BMT's motion argued for the first time that jurisdiction could be premised on Rule 4(k)(2) of the Federal Rules of Civil Procedure, which permits the court to consider the contacts of the defendant with the entire United States upon a showing that the defendant's contacts with any individual state are not sufficient to provide a basis for jurisdiction. BMT also sought discovery to permit it to locate additional contacts that NKAZ allegedly may have with the United States. Again, however, BMT did not argue that jurisdiction could be based on the alleged presence of NKAZ property in Maryland, even without minimum contacts, and again BMT did not cite *Shaffer* v. *Heitner*.

On June 14, 2001, the District Court denied the motion for reconsideration. Assuming without deciding that the motion was procedurally proper, the District Court held that Rule 4(k)(2) was inapplicable because BMT—rather than demonstrating that there was no basis for jurisdiction over NKAZ in any state, as the Rule required—was contending actively that courts in several other states had jurisdiction over NKAZ. Pet. App. 13a-17a.

7. BMT appealed. In its brief on appeal, BMT for the first time argued that the presence of alleged NKAZ property in

Maryland was sufficient to give the District Court jurisdiction over NKAZ for purposes of BMT's action to confirm and enforce the arbitration award, even without minimum contacts. *See* Brief of Appellant, filed Sept. 18, 2001, at 11, 15-18.

8. The Fourth Circuit affirmed. Initially, the Court of Appeals held that the Convention and implementing legislation, while conferring subject matter jurisdiction on the federal courts over an action to confirm a foreign arbitration award, did not eliminate the need for a plaintiff to establish a constitutional basis for exercising personal jurisdiction over the defendant. Pet. App. 5a (citing *Transatlantic Bulk Shipping Ltd.* v. *Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985) (Leval, J.)).

Applying the "minimum contacts" test of *International Shoe*, the Court of Appeals then held that there was no basis for personal jurisdiction over NKAZ. Pet. App. 5a-10a. The Court noted that BMT's cause of action did not arise out of any alleged NKAZ contact with Maryland and had no relationship to the shipment of aluminum that had arrived in the Port of Baltimore, Pet. App. 8a-9a; that there was no evidence that "NKAZ even attempted to do business in Maryland at all," Pet. App. 9a; that NKAZ was a Russian corporation whose "business consists entirely of manufacturing aluminum in its Russian plant," *id.*; and that NKAZ had no offices or agents in Maryland, "has never conducted a financial transaction in Maryland, and has no assets of any kind in Maryland." *Id.* In this light, the Court held, "[t]he mere fact that metal NKAZ manufactured in Russia was shipped to the United States does not amount to significant contacts with Maryland." *Id.*

The Court rejected BMT's argument that the presence of a single shipment of alleged NKAZ aluminum in Maryland was a sufficient basis for jurisdiction. Pet. App. 6a-7a, 8a-9a. The Court noted that "it is not clear that the aluminum in

question belonged to NKAZ." Pet. App. 8a. "Even assuming, however," that it did belong to NKAZ, the Court held that this did not provide any constitutional basis for jurisdiction. *Id.* As the Court explained, this Court's decision in *Shaffer* v. *Heitner* "eliminated all doubt that the minimum contacts standard in *International Shoe* governs *in rem* and *quasi in rem* actions as well as *in personam* actions." Pet. App. 7a (citing *Shaffer*, 433 U.S. at 207-212). The Court ruled that *Shaffer* also makes clear that "the presence of [the defendant's] property [in a state] alone will not support jurisdiction" in the absence of any "other ties" between the defendant and the forum state. Pet. App. 7a (citing *Shaffer*, 433 U.S. at 209).

The Court also rejected BMT's argument that Rule 4(k)(2) provides a basis for jurisdiction in this case, on the ground, *inter alia*, that BMT had failed to show that NKAZ had minimum contacts with the United States as a whole, Pet. App. 10a, and BMT's argument that the District Court had abused its discretion in denying its request to conduct jurisdictional discovery. Pet. App. 12a n.3.

REASONS FOR DENYING THE WRIT

BMT does not seek review of the Fourth Circuit's holdings that there were no minimum contacts between NKAZ and Maryland, or between NKAZ and the entire United States, sufficient to provide a constitutional basis for the exercise of jurisdiction. Thus, the sole issue presented by the petition is whether, in the absence of minimum contacts, the presence in Maryland of a single shipment of aluminum allegedly belonging to NKAZ provides a constitutionally sufficient basis for jurisdiction over this action.

This issue does not warrant review by this Court. The Fourth Circuit faithfully applied *Shaffer* in the particular context of an action to confirm a foreign arbitration award, and nothing in *Shaffer* raises any question about the correctness of the Fourth Circuit's ruling. Similarly, contrary to the

claims of the petition, the Fourth Circuit's ruling is not in conflict with the decision of any other circuit. The Ninth Circuit decision upon which BMT principally relies in fact concluded—like the decision below—that there was no constitutional basis for jurisdiction to confirm the foreign arbitration award, and merely suggested in *dicta* that the result might have been different on other facts. There have been few court decisions involving this narrow issue, and thus there is substantial reason to doubt both the importance of the question presented and the need for the Court to resolve it at this time. Finally, the record shows that the issue petitioner seeks to raise was not squarely presented below and is based on a hypothetical version of the facts. Thus, this would not be an appropriate case for the Court's review, even if the issue were otherwise sufficiently important and ripe to warrant review.

I. THE FOURTH CIRCUIT'S RULING IS CONSISTENT WITH *SHAFFER*.

1. Contrary to petitioner's claims, the Fourth Circuit's decision is fully consistent with, and indeed mandated by, this Court's decision in *Shaffer* v. *Heitner*. In *Shaffer*, the Court held unconstitutional a Delaware statute that permitted an action against non-resident defendants based on their ownership of property within the state, to wit, their shares in a Delaware corporation. The Court expressly rejected the argument that the "minimum contacts" test was irrelevant because the action was *quasi in rem*, based on the attachment of property within the state. 433 U.S. at 196, 205-206. Rather, as the Fourth Circuit noted below, Pet. App. 7a, the Court recognized that a judicial assertion of jurisdiction over property is, in effect, an assertion of jurisdiction over the interests of the defendant in that property, and thus must satisfy the "minimum contacts" standard of *International Shoe* with respect to the defendant. 433 U.S. at 207.

Accordingly, the Court in *Shaffer* held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212. While "the presence of property in a State may bear on the exercise of jurisdiction by providing contacts among the forum State, the defendant and the litigation," *id.* at 207, "the presence of the property alone would not support the State's jurisdiction." *Id.* at 209. The Court recognized that this approach "would result in significant change" in determining jurisdiction in *quasi in rem* actions, particularly "where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action." *Id.* at 208-209.

The Fourth Circuit's holding that the alleged presence of NKAZ property in Maryland does not alone suffice to support jurisdiction in this case thus falls squarely with the rule announced in *Shaffer*. This is particularly true because BMT in this case was seeking an *in personam* judgment against NKAZ, confirming the arbitration award in an amount that substantially exceeded the alleged value of the property sought to be attached. But even if this action is viewed as one *quasi in rem*—notwithstanding BMT's failure to advance that theory in the complaint or at any time when there was still property subject to the jurisdiction of the court—the Fourth Circuit correctly held that, under *Shaffer*, jurisdiction in *in rem* or *quasi in rem* actions likewise must be subject to the minimum contacts test.

2. BMT relies principally on a single footnote in the *Shaffer* opinion, 433 U.S. at 210 n.36, which stated: "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an initial matter." Although BMT refers to this as "the holding of *Shaffer*," Pet. i, 7, it is obviously no more

than *dicta* observing that there might be a basis for a different result in a context not then before the Court.

More important, this *dicta* has no bearing on the issue presented in this case: jurisdiction to enforce a foreign arbitration award. The *Shaffer* footnote refers to the enforceability of a court *judgment* obtained in a sister state, and the accompanying text makes clear that the Court was referring only to a court judgment that would be entitled to full faith and credit. 433 U.S. at 210 ("The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States."). Thus, even if this *dicta* states the correct legal rule as to jurisdiction to enforce a sister-state judgment, the *Shaffer* footnote has no bearing on jurisdiction to enforce a foreign arbitration award, which does not involve a court judgment, does not include the same guarantee that the defendant received due process before the claim was adjudicated, and does not have the same constitutional imperative requiring recognition under the Full Faith and Credit Clause.

This Court has repeatedly emphasized that an arbitration award does not have the same status as a court judgment and is not entitled to the same binding effect. *See, e.g., Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 222-223 (1985) ("[T]he preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest * * * . The full faith and credit statute requires that federal courts give * * * preclusive effect to a State's *judicial proceedings* * * *; [but] since arbitration is not a judicial proceeding, * * * the statute does not apply to arbitration awards.") (emphasis in original); *McDonald* v. *City of West Branch*, 466 U.S. 284, 288, 292 (1984) (holding that federal courts are not obligated by the full-faith-and-credit statute to give res judicata or collateral estoppel effect to an arbitration award, because "[a]rbitration is not a 'judicial proceeding,'" and there is no basis for judicial creation of a rule requiring

such preclusive effect, because "an arbitration proceeding cannot provide an adequate substitute for a judicial trial").

Petitioner's suggestion that the Court's *dicta* in *Shaffer*—applicable at most to enforcement of court judgments entitled to full faith and credit—is readily transferable to the far more complicated issue of jurisdiction to enforce a foreign arbitration award, is thus far too facile. In fact, this Court has never spoken to the question of jurisdiction to enforce a foreign arbitration award.[6]

Moreover, there are other important distinctions between a sister-state judgment and an arbitration award. In addition to the points noted above, there are substantial grounds for defense in an action to enforce a foreign arbitration award that are permitted by the Convention and implementing legislation. Title 9, U.S. Code, Section 207 provides that the

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[6] BMT's petition also includes a quotation from the text of the Court's opinion, Pet. 8-9, but petitioner deletes by ellipsis crucial portions of the Court's reasoning, which make clear that *Shaffer* provides no basis for, and indeed rejects, BMT's argument. Petitioner quotes the Court's statement that the "primary rationale for treating the presence of property as a sufficient basis for jurisdiction * * * is that a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit,'" 433 U.S. at 210 (quoting Restatement (Second) of Conflict of Laws § 66, cmt. a (1971)).

BMT neglects to advise the Court, however, that the *Shaffer* Court rejected this argument. BMT omits the following sentences: "This justification does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim." 433 U.S. at 210. In this case, of course, there is no evidence that NKAZ was seeking to move its property to Maryland in order to avoid its obligations in Russia; in fact, all of NKAZ's assets remain in Russia, subject to the jurisdiction of the Russian courts. Nor, as discussed above, is there any jurisdictional basis for permitting litigation in this forum of the "underlying claim" against NKAZ, the validity of the Russian arbitration award.

court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition * * * specified in the * * * Convention." Article V of the Convention provides that it is a defense if "[t]he party against whom the award is invoked was not given proper notice * * * of the arbitration proceedings or was otherwise unable to present his case," Art. V, §1(b), or if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Art. V, §1(e).

These grounds for defense are not simply of academic interest. NKAZ in fact has substantial grounds for defense against the arbitration award at issue in this case. There is a strong argument that the arbitration award at issue here was collusive, and that NKAZ did not have a fair opportunity "to present [its] case" within the meaning of Article V, Section 1(b).[7] Moreover, NKAZ may also have a substantial argument that the award is not "binding" under Russian law, and therefore not enforceable under Article V, Section 1(e). In fact, the Russian courts have refused to enforce this same arbitration award in bankruptcy proceedings involving NKAZ, for precisely this reason.[8]

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[7] As noted above, *see* n.3, *supra*, at the time of the arbitration award, the same individuals (Mikhail and Yuri Zhivilo) controlled both BMT and NKAZ. The arbitration award reveals on its face that NKAZ did not present any defense on the merits, J.A. 21-22, even though the English courts found that Mikhail Zhivilo was responsible for causing NKAZ to breach its contracts with Soinco and Eural, *see Soinco SACI*, [1998] 2 Lloyd's Rep. at 348-49, and this could have provided a substantial defense to BMT's claim that its liability should be shifted to NKAZ.

[8] *See* Addendum 2 to the Brief of Appellee (4th Cir. filed Oct. 19, 2001) (attaching the decision of the Arbitrazh Court of the Kemerovo Region of Russia, Mar. 17, 2000). The Russian court relied on a Russian law which provides that a Russian arbitration award that has not been voluntarily honored is not enforceable until the party seeking to enforce the award brings a judicial action in Russia to obtain an enforcement order, *see* Articles 24-26 of the Interim Provision on Courts of Arbitration for Economic Disputes,

In these circumstances, as the Fourth Circuit found, Pet. App. 7a-10a, it is manifestly unfair to force NKAZ to come to a distant forum, with which it has no other connection, to litigate such substantial issues going to the merits of the validity of this arbitration award. *See Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987) (giving "significant weight" to the unfairness of subjecting Asahi to the "severe" and "unique" burdens of having to litigate at such a distance from its headquarters in Japan and to defend itself in a foreign legal system).

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

BMT also attempts to argue that there is a conflict among the circuits that requires this Court's intervention (Pet. 7-11), but this argument is also without merit. BMT relies on the Ninth Circuit's decision in *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), but again petitioners are seeking to rely on *dicta* in a decision that in fact was decided adversely to them. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 225 (8th ed. 2002) (mere "inconsistency in dicta" does not warrant grant of certiorari). In *Glencore Grain*, the Ninth Circuit held that that there was no constitutional basis for jurisdiction over an action brought by the plaintiff, a Dutch grain distributor, against Shivnath, an Indian rice supplier, to enforce an arbitration award that Glencore Grain had obtained in England. 284 F.3d at 1123-28. The Ninth Circuit rejected Glencore Grain's argument that the Convention and implementing legislation eliminated the need for a plaintiff seeking to confirm a foreign arbitration award to establish that there was a constitutional basis for personal jurisdiction over the

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adopted by the Supreme Soviet Decree of June 24, 1992, as amended by Russian Federal Law No. 144-FZ, dated Nov. 16, 1997 (translation attached hereto as Appendix F), and here BMT failed to take any steps to obtain an order enforcing its arbitration award in Russia. *See* Br. of Appellee (4th Cir.) at Add. 5-6.

defendant. *Id.* at 1120-22. On the contrary, the Court held that jurisdiction in an action to confirm an arbitration award must be determined "by inquiring whether maintenance of a suit against the defendant comports with the constitutional notions of due process as outlined in *International Shoe Co.* v. *Washington.*" *Id.* at 1121. Applying this traditional test, the Court held that there were no minimum contacts to support jurisdiction, even though Shivnath had a sales agent in California and had sent fifteen shipments of rice to San Francisco. *Id.* at 1124-25. The Court also held that the exercise of jurisdiction over Shivnath would be unreasonable, in view of the burden on Shivnath to defend in California and the absence of any connection between the forum state and the underlying cause of action. *Id.* at 1125-26.

It is true that the Court in *dicta* suggested that jurisdiction to confirm a foreign arbitration award might conceivably be premised on the existence of specific assets of the defendant in California. *Id.* at 1127. But the Court went on to hold that this potential theory of jurisdiction did not assist Glencore Grain, because it had been unable to identify any property of the defendant in the jurisdiction. *Id.* at 1127-28. Thus, this aspect of the Court's opinion was not necessary to its decision, and was not fully considered.[9] In any event, it is equally true here that there is no NKAZ property subject to the jurisdiction of the court, since the aluminum at issue belonged to MG, not NKAZ, and was released from the Court's jurisdiction before BMT ever sought to invoke *quasi in rem* jurisdiction. Thus, *Glencore Grain* provides no support for BMT's jurisdictional claim in this case.

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[9] Among other things, the Ninth Circuit failed to discuss the significant distinctions between a sister-state judgment and a foreign arbitration award, as discussed above, and incorrectly read the *Shaffer* footnote as having "endorsed the position urged by Glencore Grain," 284 F.3d at 1127, when in fact the Court in *Shaffer* never considered it.

The only other case cited by petitioner in support of its alleged conflict among the circuits is a recent decision of the District Court for the Southern District of New York, *CME Media Enterprises B.V.* v. *Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001). In *Zelezny*, CME Media, a Dutch company, had obtained an arbitration award in Amsterdam against Zelezny, a Czech citizen, for approximately $23 million, and filed an action to confirm the award in the Southern District of New York. CME Media conceded that there was no basis for personal jurisdiction over Zelezny, but argued that the court had jurisdiction to confirm and enforce the award because Zelezny had an account at Citibank. 2001 WL 1035138, at *1. By the time the district court heard the case, however, there was only $0.05 left in the account. The court held that it had no jurisdiction to confirm an award for $23 million, but did have jurisdiction to enforce the award against the five cents left in the account. *Id.* Relying on the footnote in *Shaffer*, and treating an arbitration award as if it were a court judgment entitled to full faith and credit, the court held that it had *quasi in rem* jurisdiction to the extent of the defendant's property in the state, and that "minimum contacts are not required." *Id.* at *3.

This unreported district court decision provides no basis for the Court to grant certiorari. Obviously, this decision does not suffice to demonstrate a conflict among the circuits. See S. Ct. Rule 10(a) (Court will consider granting certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals"). This is particularly true since *Zelezny* appears inconsistent with Second Circuit opinions that, while not confronting precisely the same issue, suggest that personal jurisdiction and minimum contacts are required in an action to confirm a foreign arbitration award. *See Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993)

(personal jurisdiction is required in action to enforce foreign arbitration award, and test is "minimum contacts"); *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F.2d 194, 198 (2d Cir. 1978) ("If plaintiffs * * * had 'attached' the debt to defendants of a debtor only transitorily in New York, * * * or even bank accounts maintained by them in New York, we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other 'contacts' with New York. In such a case, *Shaffer* v. *Heitner* clearly forbids a state from depriving a defendant of his property in the debt that is owed to him unless other contacts make it fair to do so."), *abrogated on other grounds*, *Rush* v. *Savachuk*, 444 U.S. 320 (1980); *see also American Constr. Mach. & Equip. Corp.* v. *Mechanised Construction of Pakistan*, No. 85 Civ. 3765, 1986 WL 2973, at *5 (S.D.N.Y. Mar. 5, 1986) (observing that the footnote in *Shaffer* "concerned the enforceability of a domestic state judgment, and may not be applicable * * * to enforcement of an arbitral award based on treaty"). Moreover, even if *Zelezny* were correctly decided, it upheld jurisdiction only to the extent of the amount of assets remaining before the court, and would be of no assistance to BMT here, since the aluminum in question has long since been released and there is no property of NKAZ currently subject to the court's jurisdiction.

III. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT'S REVIEW FOR OTHER COMPELLING REASONS.

In any event, even if the Court believes that the issue presented is one that ultimately might warrant the Court's review, it would be premature to do so now, and there are compelling reasons why this case does not present an appropriate vehicle for the Court to consider the issue.

First, as noted above, BMT failed to raise the issue in the District Court. BMT raised the issue for the first time in the

Court of Appeals, long after the property at issue had been released from the jurisdiction of the court.

Second, there is no longer any alleged NKAZ property within the jurisdiction of the court, and thus no basis for the Court to sustain *quasi in rem* jurisdiction on the theory advanced by BMT. Both the aluminum at issue, and the funds that were once held in escrow as substitute property, have long since been released, in light of BMT's failure to make any claim that MG did not legitimately hold title to the metal.

Third, BMT is asking the Court to decide an important constitutional issue on hypothetical facts. There is no evidence that the aluminum that BMT initially attached was in fact the property of NKAZ at *any* relevant time. On the contrary, the documentary evidence submitted to the District Court demonstrated beyond reasonable dispute that title to the property had passed to MG, an independent bona fide purchaser, long before the aluminum ever reached the United States.[10] Both courts below simply "assumed," for ease of disposition, that the property belonged to NKAZ, Pet. App. 8a, 27a, and the District Court recognized that this assumption was "contrary to the apparent facts." Pet. App. 27a. This Court should not put itself in the position of rendering a decision on an important constitutional issue on "hypothetical" facts, when it is likely that further proceedings on remand would demonstrate that the assumption on which the Court's decision was based was false, and that there is no basis for jurisdiction in this case even if BMT's theory were accepted. *See Conway* v. *California Adult Auth.*, 396 U.S.

[10] Indeed, BMT never challenged in the lower courts MG's showing that it held title to the aluminum when it arrived in Baltimore, Pet. App. 3a n.1, 27a, and BMT shifted its legal theory from the claim that NKAZ "presently owned" the aluminum (as alleged in the attachment motion, J.A. 32 ¶ 4) to the claim that "rightful title" never passed to MG because of the allegedly fraudulent conduct of NKAZ. *See* Br. of Appellant (4th Cir., filed Sept. 18, 2001), at 2.

107, 109-110 (1969) (dismissing writ as improvidently granted, where it appeared on full briefing that there was "documentary evidence that the actual facts simply do not present the issue for which certiorari was granted," and Court would in effect be "rendering an advisory opinion" on the "hypothetical issue tendered by the petition").

Fourth, a decision sustaining jurisdiction in this case would seriously interfere with the flow of international commerce. This is not a case where the defendant owned real property in Maryland or maintained a bank account within the state. Rather, the property here was a shipment of aluminum in international commerce, in transit to a bona fide customer. Even assuming that this shipment belonged to NKAZ at the moment it arrived in Baltimore, the property was clearly in transit and was, at most, only briefly and temporarily the property of NKAZ while it was within the state.

Thus, if the Court were to grant review in this case, it would be forced to consider the issue presented on very problematic facts. It is much harder to justify reliance on property in transit as a constitutional basis for jurisdiction, and a decision permitting such jurisdiction would reward and encourage attachments that risk serious interference with the flow of international trade.

This is particularly true since there is no justification in this case for an attachment of this kind. BMT argues that there is a need for attachment jurisdiction to prevent a "wrongdoer" from "avoid[ing] payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit," Pet. 9 (quoting *Shaffer*, 433 U.S. at 210), but the facts of this case do not present any such justification for jurisdiction. This case involves a company legitimately involved in international trade, not someone trying to hide his assets. NKAZ continues to be in full operation in Novokuznetsk, all of its assets are located there, and there is no

reason why BMT cannot seek to enforce its arbitration award in the Russian courts.

Finally, review in this case would be particularly inappropriate because, as noted above, NKAZ has substantial defenses to the validity of the underlying arbitration award, and it would be unfair to require NKAZ to litigate the merits of these issues in a distant forum.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MARK D. GATELY*
STEVEN F. BARLEY
IRA M. FEINBERG
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
111 South Calvert Street
Suite 1600
Baltimore, Maryland 21202
(410) 659-2700

* Counsel of Record

Counsel for Respondent OJSC "Novokuznetsky Aluminum Factory"